Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

LENORA SPAIN, LOUIS HOMESY, WALTER KOZA, THOMAS RICHARD, WILLIAM NAULT, MATTHEW DEMAS, MICHAEL ADAMS, MICHAEL GROVE, LISA HAWKINS, GARY CASTIGLIONI, CHERYL ADAMS, THOMAS RICHARD, MELISSA RAPA, RICHARD WAUGH, WELDON ADAMS, RONALD RING, PATRICIA ADAMS, ELIZABETH TARGEE, MATHEW VAN WINKLE, BRENT ADAMS, ROBERT RAVITZ, TINA LEVESQUE, CARRIE BURKE, WILLIAM CONNORS, DAVID TAYLOR, CHRISTOPHER MORRIS AND KATHLEEN MARTINS,

Petitioners,

vs.

DEMETRIOS HASEOTES, JOHN DROLETTE, ROBERT LANGFORD, JAMES MUMMA, APRIL GREEN, LILY BENTAS, BRYON HASEOTES, JOHN PECK, GEORGE HASEOTES, PETER PANTAZELOS, MARK CURRIER, MARGE OLSEN, WENDY OLSEN, DENNIS O'SULLIVAN, FRANCIS LOCKLIN, JR., FRED BEISSNER AND HARRIET ANTHONY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a civil RICO cause of action accrues when a plaintiff discovered or should have discovered the injury he suffered resulting from one act of racketeering activity or whether it accrues after the plaintiff can allege a pattern of racketeering activity as well.

2. Whether the Seventh Amendment precludes a district court from denying class members the opportunity to opt out of a class action, thereby denying them their right to a jury trial, for the reason that they filed proofs of claim in a bankruptcy court.

3. Whether that district court has the power to enjoin class members from prosecuting their claims in this subsequent action when they were never parties in the prior action and they had excluded themselves from the plaintiff class.

4. Whether those class members who filed proofs of claim may collaterally attack the order in the prior action enjoining prosecution of their claims in the subsequent action.

5. Whether the Massachusetts statute on fraudulent concealment applies to the tolling of the plaintiffs' state law claims when the defendants did not disclose their policy of interrogating employees without evidence of wrongdoing.

6. Are the defendants precluded from relitigating the issue of whether the plaintiffs' claims are barred by the statute of limitations, when a district court determined in a prior action that its judgment, consented to by the defendants, was binding on all former employees of Cumberland Farms, Inc. who were subjected to interrogation from October 15, 1970 through May 1, 1992?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provision, Statute and Rule Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6
I. Each Plaintiff Was Unable To Allege A Pattern Of Racketeering Activity Until He Discovered That The Defendants Carried Out A Policy Of Wrongfully Accusing Thousands Of Employees Of Stealing.	6
II. Rejection Of The Plaintiffs' Right To Opt Out Of The *Curley* Class, For The Sole Reason That They Filed Proofs Of Claim In A Bankruptcy Court Against Cumberland Farms, Inc., One Of The *Curley* Defendants, Denies Those Plaintiffs Their Seventh Amendment Right To A Jury Trial.	8

Contents

Page

III. The *Curley* Court Lacked Jurisdiction Over Those Class Members Who Excluded Themselves From The Class And Who Were Never Parties In The *Curley* Action. 9

IV. Lacking Jurisdiction Over Class Members Who Were Not Parties And Who Opted Out Of The *Curley* Action, The *Curley* Court's Order Enjoining Prosecution Of These Plaintiffs' Claims Was A Nullity And Subject To Collateral Attack. 9

V. The Massachusetts Statute On Fraudulent Concealment Applies To The Tolling Of The Plaintiffs' State Law Claims Where The Defendants Failed To Disclose Their Policy Of Interrogating Employees Without Evidence Of Wrongdoings, The Plaintiffs Had No Means Of Discovering The Policy, And The Defendants Had A Duty To Disclose The Policy To The Plaintiffs. 10

VI. Having Consented To A Judgment In A Prior Action Which Was Binding On All Former Cumberland Farms, Inc. Employees Who Were Subjected To Interrogation From October 15, 1970 Through May 1, 1992, The Defendants Are Precluded From Relitigating The Issue Of Whether The Plaintiffs' Claims Are Barred By The Statute Of Limitations. 11

Conclusion 12

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Agency Holding Corp. v. Malley Duff & Assoc., 483 U.S. 143 (1987) 6

Aunyx Corp. v. Canon U.S.A., Inc., 978 F.2d 3 (1st Cir. 1992) 12

Bankers Trust Co. v. Rhoades, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989) 7

Bath v. Bushkin, Gaims, Gaines & Jonas, 913 F.2d 817 (10th Cir. 1990) 7

Bivens Gardens Office Bldg. v. Barnett Bank, 906 F.2d 1546 (11th Cir. 1990), *cert. denied sub nom. Barnett Banks, Inc. v. Konstand*, 500 U.S. 910 (1991) 7

Broomfield v. Kosow, 349 Mass. 749, 212 N.E. 2d 556 (1965) 10

Caproni v. Prudential Securities, Inc., 15 F.3d 614 (6th Cir. 1994) 7

Compagnie de Reassurance v. New England Reinsur., 57 F.3d 56 (1st Cir. 1995) 11

Curley v. CFI, No. 86-5057 ..... *passim*

Contents

	Page
Danca v. Taunton Sav Bank, 385 Mass. 1, 429 N.E. 2d 1129 (1982)	10
Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)	8
Granite Falls Bank v. Henrikson, 924 F.2d 150 (8th Cir. 1991)	7
Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26 (1st Cir. 1994)	12
Grimmett v. Brown, 75 F.3d 506 (9th Cir. 1996)	7
In re CFI, No. 92-41305-JFQ	3, 4, 5
Ins. Corp. of Ireland v. Compagnie des Bauxities, 456 U.S. 694 (1982)	9
Keystone Ins. Co. v. Houghton, 863 F.2d 1125 (3d Cir. 1988)	7
LaPorte Constr. Co. v. Bayshore Nat. Bank, 805 F.2d 1254 (5th Cir. 1986)	7
Lenora Spain, et al. v. Demetrios Haseotes, et al., No. 93-11725	4, 5
Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990)	8
Matter of Providence Journal Co., 820 F.2d 1342 (1st Cir. 1986)	9

Contents

	Page
McCool v. Strata Oil Co., 972 F.2d 1452 (7th Cir. 1992)	7
N.L.R.B. v. Donna-Lee Sportswear Co., Inc., 836 F.2d 31 (1st Cir. 1987)	12
O'Reilly v. Malon, 747 F.2d 820 (1st Cir. 1984)	12
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)	8
Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211 (4th Cir. 1987)	7
Riley v. Presnell, 409 Mass. 239, 565 N.E. 2d 780 (1991)	11
Rodriguez v. Banco Cent., 917 F.2d 664 (1st Cir. 1990)	6, 7
Starr v. Fordham, 420 Mass. 178, 648 N.E. 2d 1261 (1995)	10
Stetson v. French, 321 Mass. 195, 72 N.E. 2d 410 (1947)	11
United States v. Stauffer Chemical Co., 464 U.S. 165 (1984)	11
United States v. United Mine Workers, 330 U.S. 258 (1947)	9
Warsofsky v. Sherman, 326 Mass. 290, 93 N.E. 2d 612 (1950)	10

Contents

Page

Statutes Cited:

Massachusetts General Laws c. 260, § 12 ..... 2, 10

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2101(c) 1

United States Constitution Cited:

Seventh Amendment ..... i, 2, 8

Rules Cited:

Fed. R. Civ. P. 65(d) 2, 9

Sup. Ct. R. 13.1 1

APPENDIX

Appendix A — Per Curiam Opinion of the United States Court of Appeals for the First Circuit Dated June 9, 1997 ..... 1a

Appendix B — Order of the United States Court of Appeals for the First Circuit Entered September 4, 1996 ..... 4a

Appendix C — Order of the United States District Court for the District of Massachusetts Dated August 9, 1995 ..... 7a

Contents

Page

Appendix D — Order of the United States District Court for the District of Massachusetts Dated May 2, 1995 ..... 13a

Appendix E — Order Entering Injunctive Relief and Holding Party in Civil Contempt in the United States District Court for the District of New Jersey Filed May 4, 1994 ..... 14a

Petitioners Lenora Spain, Louis Homsey, Walter Koza, Thomas Richard, William Nault, Matthew Demas, Michael Adams, Michael Grove, Lisa Hawkins, Gary Castiglioni, Kathleen Martins, Cheryl Adams, Melissa Rapa, Richard Waugh, Weldon Adams, Ronald Ring, Patricia Adams, Elizabeth Targee, Matthew Van Winkle, Brent Adams, Robert Ravitz, Tina Levesque, Carrie Burke, William Connors, David Taylor and Christopher Morris respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on June 9, 1997. A petition for rehearing was denied on September 3, 1997.

OPINIONS BELOW

The United States District Court for the District of Massachusetts ordered judgment for the defendants, dismissing the petitioners' claims in *Lenora Spain, et al. v. Demetrios Haseotes, et al.*, No. 93-11725-JLT, on May 2, 1995 (Appendix D, 13a). It issued a substitute order on August 9, 1995 (Appendix C, 7a). On September 4, 1996, the United States Court of Appeals for the First Circuit dismissed the appeals of eleven petitioners who had been enjoined from prosecuting their claims (Appendix B, 4a). It affirmed the judgment of dismissal on June 9, 1997 in an unpublished opinion (Appendix A, 1a).

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 9, 1997 and denied a petition for rehearing on September 3, 1997. This petition is timely filed within ninety (90) days of that entry. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

1. The Seventh Amendment provides in pertinent part:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .

2. Massachusetts General Laws c. 260, § 12 provides:

> Fraudulent concealment; commencement of limitations
>
> If a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action.

3. Federal Rule of Civil Procedure 65(d) provides in pertinent part:

> Every order granting an injunction . . . is binding only upon the parties to the action . . . .

STATEMENT OF THE CASE

On December 24, 1986, former Cumberland Farms, Inc. ("CFI") employees filed a class action lawsuit in the United States District Court for the District of New Jersey, *Curley v.*

CFI, No. 86-5057. The crux of the complaint was that the defendant officers and employees of CFI carried out a scheme by which low level employees were wrongfully accused of stealing and coerced into signing confessions through threats, including that of being arrested.

Procedure No. 203-5, TERMINATION OF EMPLOYEES, promulgated in 1972 and never rescinded, spelled out the Cumberland Farms policy of making up for inventory losses by having CFI loss prevention specialists plan with area supervisors to obtain confessions from employees. It required CFI supervisors to terminate managers who could not control inventories unless the manager could show that the inventory was affected by a subordinate who confessed to the dishonesty.

The Director of the CFI Loss Prevention Department directed the interrogation of approximately 40,000 employees and the production of confessions from more than 20,000. His 1985 Memorandum Re: Productivity, Standards and Job Requirements — never rescinded — required each loss prevention specialist to produce an absolute minimum of 30 interrogations per month. He made it clear that interrogations were the primary responsibility and that CFI did not have the luxury of investigation.

CFI filed a chapter 11 bankruptcy petition on May 1, 1992 in the United States Bankruptcy Court for the District of Massachusetts, *In re CFI*, No. 92-41305-JFQ. Eleven of these plaintiffs filed proofs of claim in June of 1992.

On June 22, 1993, the *Curley* parties reached a preliminary settlement. Terms of the settlement included: (1) a class would be certified for settlement purposes consisting of former CFI employees who were the subject of questioning or attempted questioning from October 15, 1970, the date the RICO Act went

into effect, until May 1, 1992; and (2) the parties would seek approval from the bankruptcy court for a mandatory non-opt out class consisting of all individuals who filed proofs of claim related to CFI's loss prevention practices.

The Cumberland Farms defendants agreed to compensate over 37,000 class members who were subjected to interrogation, paid money to Cumberland Farms, were charged with a criminal offense, were arrested, were acquitted, or received treatment by a mental health professional as a result of Cumberland Farms' loss prevention policies and procedures. CFI agreed to not oppose expungement of criminal convictions resulting from its policies.

On July 10, 1993, the petitioners moved to intervene in the *Curley* case as plaintiffs. The *Curley* court denied the motion for the reason that the petitioners could opt out of the class. They opted out of the class in valid and timely fashion on August 27, 1993.

On August 30, 1993, the bankruptcy court approved a joint motion by the debtor, CFI, and the *Curley* plaintiffs for a mandatory non-opt out class of former CFI employees who filed proofs of claim in *In re CFI*. In August of 1993 the petitioners filed a class action in the United States District Court for the District of Massachusetts, *Lenora Spain, et al. v. Demetrios Haseotes, et al.*, No. 93-11725. They did not name CFI as a defendant. They alleged that the defendants, CFI officers and employees, conspired to make up for inventory losses by accusing employees of stealing from CFI's stores. They claimed the defendants, almost always without evidence of wrongdoing, tricked and threatened employees into writing out and signing confessions. They sought compensation for false imprisonment, abuse of process, malicious prosecution, defamation, and for violations of the Massachusetts Civil Rights Act, of the RICO Act, and of ERISA.

The *Curley* court issued a Final Order and Judgment approving the class settlement on September 8, 1993. The order stated:

> 1. This Court has jurisdiction over the subject matter of this action and over all parties, including all members of the Class as that term is defined above. This order is binding upon all members of the Class except those persons who made timely and valid requests for exclusion from the Class.

On May 4, 1994, the *Curley* court issued an Order Entering Injunctive Relief and Holding Party in Civil Contempt (Appendix E, 14a). The order enjoined the eleven petitioners who filed proofs of claim in *In re CFI* from prosecuting their claims against CFI or any of its past or present owners, directors, officers, employees, agents or attorneys. The *Curley* court concluded that each of the eleven was a member of the settlement class based on the bankruptcy court's order approving the mandatory non-opt out class composed of those who filed proofs of claim in *In re CFI*. The injunctive order did not mention the 15 petitioners who excluded themselves from the settlement class and did not file proofs of claim in CFI's bankruptcy case. The Court of Appeals for the Third Circuit affirmed the *Curley* court's decision.

The United States District Court for the District of Massachusetts ordered the dismissal of the *Spain v. Haseotes* action and entered judgment for the defendants on May 2, 1995. On August 9, 1995, it found in the substituted Proposed Order submitted by the defendants that: (1) the eleven plaintiffs who submitted proofs of claim to the bankruptcy court were bound by the *Curley* settlement; and (2) the claims of most of the plaintiffs were barred by the statute of limitations.

On September 4, 1996, the United States Court of Appeals for the First Circuit ordered the dismissal of the appeals of the eleven petitioners who filed proofs of claim in the bankruptcy case. It found that they had a full opportunity to litigate the question concerning their membership in the *Curley* class and could not raise it again.

The First Circuit affirmed the dismissal of the complaint of the plaintiffs-appellants on June 9, 1997. It decided that Massachusetts law would apply to the statute of limitations of the state law claims. It saw no reason to apply the doctrine of fraudulent concealment.

REASONS FOR GRANTING THE WRIT

I.

EACH PLAINTIFF WAS UNABLE TO ALLEGE A PATTERN OF RACKETEERING ACTIVITY UNTIL HE DISCOVERED THAT THE DEFENDANTS CARRIED OUT A POLICY OF WRONGFULLY ACCUSING THOUSANDS OF EMPLOYEES OF STEALING.

In *Agency Holding Corp. v. Malley Duff & Assoc.*, 483 U.S. 143 (1987), this Court established a four-year statute of limitations for RICO civil enforcement actions. It did not decide the appropriate time of accrual for a RICO claim. It expressed a desire for uniformity among the states and for a reduction in litigation, as well as to avoid forum shopping and uncertainty for parties.

This Court can reduce litigation and forum shopping by establishing a uniform rule of accrual for civil RICO actions. The First, Second, Fourth, Fifth, Seventh, and Ninth Circuits follow the injury discovery rule. *Rodriguez v. Banco Cent.*, 917

F.2d 664, 665-68 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *LaPorte Constr. Co. v. Bayshore Nat. Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-65 (7th Cir. 1992); *Grimmett v. Brown*, 75 F.3d 506, 511 (9th Cir. 1996). The civil RICO limitations period begins to run when a plaintiff knows or should know of the injury that underlies his cause of action. A new cause of action accrues for each new injury, even if the RICO violation causing the injury happened more than four years before. The plaintiff need not discover that the injury is part of a pattern of racketeering activity for the period to begin to run.

The Sixth, Eighth, Tenth, and Eleventh Circuits follow the injury and pattern discovery rule, under which the plaintiff must discover or be in a position to discover the existence of a pattern of racketeering activity, in addition to the existence of the injury, for the limitations period to begin to run. *Caproni v. Prudential Securities, Inc.*, 15 F.3d 614, 619-20 (6th Cir. 1994); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820-21 (10th Cir. 1990); *Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1554 (11th Cir. 1990), *cert. denied sub nom. Barnett Banks, Inc. v. Konstand*, 500 U.S. 910 (1991).

The Third Circuit follows the last predicate act rule. It provides that the accrual period runs from the time the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same pattern. *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1126 (3d Cir. 1988).

The defendants concealed their policy of coercing

confessions from employees without evidence. Each plaintiff knew that he was injured by the defendants' confession policy. He was unable to bring a RICO claim where he had no knowledge of other predicate acts carried out by the defendants. Not until August of 1993 when *Curley* class members were notified of the class action settlement could the plaintiffs learn that CFI had a policy of coercing confessions from employees. Without accrual not starting until the plaintiffs discover the pattern of racketeering activity, the perpetrators of racketeering acts could avoid liability to their victims.

II.

REJECTION OF THE PLAINTIFFS' RIGHT TO OPT OUT OF THE *CURLEY* CLASS, FOR THE SOLE REASON THAT THEY FILED PROOFS OF CLAIM IN A BANKRUPTCY COURT AGAINST CUMBERLAND FARMS, INC., ONE OF THE *CURLEY* DEFENDANTS, DENIES THOSE PLAINTIFFS THEIR SEVENTH AMENDMENT RIGHT TO A JURY TRIAL.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S 797, 812 (1985), this Court decided that absent plaintiff class members must be granted the opportunity to opt out of a class action. These plaintiffs have a right to a jury trial where their claims are legal in nature and involve a matter of private right. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989). The Seventh Amendment precludes the *Curley* court from denying the plaintiffs the opportunity to opt out of the *Curley* class and to have a jury trial. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 553 (1990).

Filing proofs of claim in the bankruptcy court was the only means of recovering from Cumberland Farms, Inc., which had filed a bankruptcy petition. The plaintiffs should not have to

choose between the loss of the right to a jury trial and the loss of any right of recovery against the bankrupt estate.

III.

THE *CURLEY* COURT LACKED JURISDICTION OVER THOSE CLASS MEMBERS WHO EXCLUDED THEMSELVES FROM THE CLASS AND WHO WERE NEVER PARTIES IN THE *CURLEY* ACTION.

These plaintiffs were never parties in the *Curley* action. The *Curley* court denied their motion to intervene on the grounds that they could exclude themselves. They did exclude themselves. Without subject matter jurisdiction over class members who opted out and without jurisdiction over nonparties, the *Curley* court lacked authority to enjoin these plaintiffs from prosecuting their claims. Fed. R. Civ. P. 65(d); *Ins. Corp. of Ireland v. Compagnie des Bauxities*, 456 U.S. 694, 702 (1982).

IV.

LACKING JURISDICTION OVER CLASS MEMBERS WHO WERE NOT PARTIES AND WHO OPTED OUT OF THE *CURLEY* ACTION, THE *CURLEY* COURT'S ORDER ENJOINING PROSECUTION OF THESE PLAINTIFFS' CLAIMS WAS A NULLITY AND SUBJECT TO COLLATERAL ATTACK.

The collateral bar rule prevents attack on an erroneous order or judgment. It does not insulate void orders or judgments from collateral attack. *United States v. United Mine Workers*, 330 U.S. 258, 289-95 (1947). The order of the *Curley* court enjoining proceedings in this action is clearly subject to collateral attack where it lacked jurisdiction over these plaintiffs. *Matter of Providence Journal Co.*, 820 F.2d 1342, 1346 (1st Cir. 1986).

V.

THE MASSACHUSETTS STATUTE ON FRAUDULENT CONCEALMENT APPLIES TO THE TOLLING OF THE PLAINTIFFS' STATE LAW CLAIMS WHERE THE DEFENDANTS FAILED TO DISCLOSE THEIR POLICY OF INTERROGATING EMPLOYEES WITHOUT EVIDENCE OF WRONGDOINGS, THE PLAINTIFFS HAD NO MEANS OF DISCOVERING THE POLICY, AND THE DEFENDANTS HAD A DUTY TO DISCLOSE THE POLICY TO THE PLAINTIFFS.

The First Circuit applied Massachusetts law to the plaintiffs' state law claims. It erred in not applying the doctrine of fraudulent concealment to toll the statute of limitations as provided in Massachusetts General Laws c. 260, § 12. The defendants owed a fiduciary duty to the plaintiffs where the defendants were vastly more powerful, where the defendants abused the disparity in power to their own benefit and where the defendants were unjustly enriched. *Warsofsky v. Sherman*, 326 Mass. 290, 293, 93 N.E. 2d 612, 615 (1950). The catalyst in transforming the relationship into a fiduciary one was the defendants' knowledge of the plaintiffs' reliance on them. *Broomfield v. Kosow*, 349 Mass. 749, 755, 212 N.E. 2d 556, 560 (1965). A fiduciary is a person having duties involving good faith, trust and candor towards another. *Starr v. Fordham*, 420 Mass. 178, 183, 648 N.E. 2d 1261, 1265 (1995).

The plaintiffs provided uncontroverted evidence that the defendants had a policy of accusing employees of stealing without cause to induce the employees into giving false confessions, proving that there was fraudulent concealment. *Danca v. Taunton Sav Bank*, 385 Mass. 1, 8, 429 N.E. 2d 1129, 1133 (1982). The defendants breached their duty to the plaintiffs to exercise good faith and to disclose all material facts.

Compagnie de Reassurance v. New England Reinsur., 57 F.3d 56, 73 (1st Cir. 1995). Breach of a duty to reveal facts constitutes fraudulent concealment and tolls the statute of limitations. *Riley v. Presnell*, 409 Mass. 239, 244, 565 N.E. 2d 780, 785 (1991). In addition the period of limitations was tolled under section 12 where the defendants committed affirmative acts with the intent to deceive. *Stetson v. French*, 321 Mass. 195, 198, 72 N.E. 2d 410, 412 (1947).

VI.

HAVING CONSENTED TO A JUDGMENT IN A PRIOR ACTION WHICH WAS BINDING ON ALL FORMER CUMBERLAND FARMS, INC. EMPLOYEES WHO WERE SUBJECTED TO INTERROGATION FROM OCTOBER 15, 1970 THROUGH MAY 1, 1992, THE DEFENDANTS ARE PRECLUDED FROM RELITIGATING THE ISSUE OF WHETHER THE PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

The defendants consented to the judgment of the United States District Court for the District of New Jersey in the *Curley* case. The *Curley* court certified a class composed of all Cumberland Farms, Inc. employees subjected to questioning from October 15, 1970 through May 1, 1992. The judgment bound all members of the class except those who opted out. The doctrine of collateral estoppel precludes relitigating the issue of whether the plaintiffs' claims are barred by the statute of limitations. *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 172 (1984). The First Circuit has determined that four elements must be present for issue preclusion. Those elements are present here: (1) the issue is the same here and in *Curley;* (2) the issue was actually litigated; (3) the issue was determined by a valid and final judgment; and (4) the determination was

essential to the *Curley* judgment. *N.L.R.B. v. Donna-Lee Sportswear Co., Inc.*, 836 F.2d 31, 34 (1st Cir. 1987).

The issue of the statute of limitations was "actually" decided even if it was not explicitly decided in *Curley* where it constituted a necessary component of the decision reached. *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 31 (1st Cir. 1994). The First Circuit gives collateral estoppel effect to settlements as in *Curley* where it is clear that the parties intended their agreement to have that effect. *Aunyx Corp. v. Canon U.S.A., Inc.*, 978 F.2d 3, 6 (1st Cir. 1992). Collateral estoppel is appropriate to bar the defendants from raising the issue of the statute of limitations where they had a full and fair opportunity over seven years to litigate the matter in the *Curley* case. *O'Reilly v. Malon*, 747 F.2d 820, 823 (1st Cir. 1984).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JUNE 9, 1997

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1530

LENORA SPAIN, ET AL.,

Plaintiffs, Appellants,

v.

DEMETRIOS HASEOTES, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro, *U.S. District Judge*]

Before

Selya, Boudin and Stahl,
Circuit Judges.

Stanley R. Cohen on brief for appellants.

Philip J. Moss and *Moon, Moss, McGill & Bachelder, P.A.* on brief for appellees.

JUNE 9, 1997

Appendix A

Per Curiam. After carefully reviewing the record and the parties' briefs, we *affirm* the judgment of the district court dismissing the complaint of the plaintiffs-appellants. In so doing, we essentially rely on the reasoning contained in that court's order, dated August 9, 1995. We add only the following comments.

The state common law claims of the plaintiffs are governed by state law. In cases based on diversity of citizenship or on pendent jurisdiction, the federal district court must apply the forum state's choice-of-law rules. *See Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Rogers* v. *Grimaldi*, 875 F.2d 994, 1002 (2d Cir. 1989). Thus, we look to Massachusetts conflicts law to determine what limitations period it would apply. Massachusetts, in turn, uses "the traditional rule that the local law of the forum determines whether an action is barred by a statute of limitations." *Hemric* v. *Reed & Prince Mfg. Co.*, 739 F.2d 1, 2-3 (1st Cir. 1984) (applying the Massachusetts statute of limitations to a claim based on a tort which occurred in North Carolina); *Cosme* v. *Whitin Mach. Works, Inc.*, 417 Mass. 643, 645, 632 N.E.2d 832, 834 (1994) (Massachusetts considers statutes of limitations as procedural and, as the forum state, applies its own law).

The limitations period for torts in Massachusetts is three years. *See* M.G.L.c. 260, § 2A. Similarly, a three-year limitations period governs plaintiffs' claims based on the Massachusetts Civil Rights Act. *Id.* § 5B. Because the case at hand was commenced more than three years after all of the plaintiffs' tort claims accrued, these claims are time-barred. We can see no reason to apply the doctrine of fraudulent concealment in the circumstances of this case.

Appendix A

The judgment of the district court is *affirmed* and all pending motions are therefore *denied* as moot.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED SEPTEMBER 4, 1996

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1530

LENORA SPAIN, ET AL.,

Plaintiffs, Appellants,

v.

DEMETRIOS HASEOTES, ET AL.,

Defendants, Appellees.

No. 95-1540

CHERYL ADAMS, ET AL.,

Plaintiffs, Appellants,

v.

KEVIN BURKE, ET AL.,

Defendants, Appellees.

Before

Torruella, *Chief Judge*,
Cyr and Stahl, *Circuit Judges*.

ORDER OF COURT

Entered September 4 , 1996

Appendix B

Appellees have moved to dismiss the appeals of eleven appellants in these consolidated cases. Appellants oppose the motion on essentially three grounds, each of which we reject for the following reasons:

1. Appellants are barred by the release contained in the settlement and final order in *Curley* v. *Cumberland Farms Dairy, Inc.*, No. 86-5057 (D.N.J. 1993), from pursuing their claims in the cases on appeal. The New Jersey district court decided that appellants were class members and subject to the settlement and release when it issued an injunction ordering appellants to comply with the *Curley* settlement. The Court of Appeals for the Third Circuit affirmed the district court's decision. *See Curley* v. *Cumberland Farms Dairy, Inc.*, No. 94-5306, slip op. at 4, 9 (3d Cir. 1995). Appellants had argued in the New Jersey proceedings, as they do now, that they had opted out of the *Curley* class. Because they had a full opportunity to litigate the question concerning their membership in the *Curley* class, they may not raise it again. *See Allen* v. *McCurry*, 449 U.S. 90, 94-95 (1980). *See also Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29, 31-32 (1st Cir. 1991) (where plaintiffs in one action litigated and lost on the question whether they were members of a class subject to a class settlement in that action, they are bound by the release contained in the settlement; collateral estoppel bars relitigation of their status as class members in a second action).

2. The conclusion that appellants are members of the *Curley* class and, thus, subject to the release contained in the *Curley* settlement and final order moots their contention that the release in the bankruptcy order of August 30, 1993 only barred their claims against CFI, not the individual appellees. That is, under the *Curley* release, appellants' claims against appellees are barred in any case.

Appendix B

3. A review of the amended complaint in *Adams* v. *Burke* reveals that the § 1983 claims of these eleven appellants are premised on events related to judicial proceedings which were initiated *prior* to the August 30, 1993 bankruptcy order and which plainly relate to appellants' employment at and termination from CFI. Thus, the release contained in the *Curley* settlement bars the prosecution of these § 1983 claims.

Therefore, Appeal No. 95-1540 is summarily *dismissed* and appellants Cheryl Adams, Elizabeth Targee, Richard Waugh, Carrie Burke, Melissa Smith Rapa, Ronald Ring, Patricia Adams, Weldon Adams, Brent Adams, Tina Levesque and Robert Ravitz are summarily *dismissed* from Appeal No. 95-1530. *See* Local Rule 27.1. Appellees' motion for damages under FRAP 38 is *denied*.

So ordered.

By the Court:

WILLIAM H. NG
Clerk.

[cc: Messrs. Cohen, Hayes, Gilmore, Moss]

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED AUGUST 9, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA No. 93-11725-JLT

LENORA SPAIN, et al.,

Plaintiffs,

v.

DEMETRIOS HASEOTES, et al.,

Defendants.

ORDER

August 9, 1995

TAURO, Ch.J.

The court hereby orders as follows:

1. The attached Proposed Order, submitted by the Defendants, is substituted in its entirety for the court's order of April 17, 1995, with the exception that the name "Lisa Hawkins" is deleted from the fourth sentence of paragraph 2.

It is so ordered.

s/ J. Tauro
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action
Docket No. 93-11725 JLT

LENORA SPAIN, et al.

Plaintiffs

v.

DEMETRIOS HASEOTES, et al.

Defendants

PROPOSED ORDER

This action is dismissed in its entirety, for the following reasons:

1. Eleven of the plaintiffs (Cheryl Adams, Ronald Ring, Richard Waugh, Brent Adams, Carrie Burke, Patricia Adams, Elizabeth Targee, Melissa Smith Rapa, Robert Ravitz, Weldon Adams and Tina Levesque) are bound by an Order of the United States Bankruptcy Court for the District of Massachusetts to participate in the class-wide settlement of claims in *Curley, et al. v. Cumberland Farms, Inc., et al.*, United States District Court for the District of New Jersey, No. 86-5057 (SSB). The Final Order and Judgment dated September 8, 1993 in that case barred all claims of these plaintiffs against Cumberland Farms, Inc., its past or present owners, directors, officers, employees, agents, attorneys, insurers or named insureds, arising out of the class members' employment with Cumberland Farms. These

eleven plaintiffs appealed from the Final Order and Judgment in *Curley*, and their appeal was denied by the United States Court of Appeals for the Third Circuit, *Curley, et al. v. Cumberland Farms, et al.*, 27 F.3d 556 (3rd Cir. 1994). These plaintiffs did not seek review in the Supreme Court of that decision. However, they have appealed the order of the Bankruptcy Court requiring their participation in the class settlement in *Curley*. That appeal is still pending before another judge of this Court, No. 93-40187XX. In the event that their appeal is allowed, these eleven plaintiffs may apply to this Court for relief from this Order, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure.

2. The RICO and ERISA claims of the foregoing eleven plaintiffs and one other plaintiff (Matthew Van Winkle) have already been adjudicated by this Court and dismissed on the merits (and the RICO claim of one of these plaintiffs, Cheryl Adams, has been dismissed on the merits on two separate occasions in two separate lawsuits by two separate judges of this Court). Accordingly, those claims are dismissed as a matter of *res judicata*. The RICO and ERISA claims asserted by other plaintiffs are also dismissed, based upon the reasoning relied upon by Judges Skinner and Harrington in *Adams v. Cumberland Farms, Inc., et al.*, No. 91-10627-S, and *Ring, et al. v. Haseotes, et al.*, No. 93-10051H, in their respective decisions in those cases, dated July 29, 1992 and April 23, 1993. An independent basis for dismissing the RICO and ERISA claims of Plaintiffs Lisa Hawkins and David Snyder is that these plaintiffs are also members of the *Curley* class, and their claims are barred by the September 8, 1993, Final Order and Judgment in *Curley*. A further, independent basis for dismissing the RICO and ERISA claims of Plaintiffs Michael Adams, Gary Castiglioni, William Connors, Matthew Demas, Michael Grove, Louis Homesy,

Walter Koza, Christopher Morris, William Nault, Thomas Richard, Lenora Spain, David Taylor and Matthew Van Winkle is that their claims are barred by the applicable statutes of limitations.

3. In the *Adams* and *Ring* cases described above, having dismissed the claims grounded in federal law, this Court declined to exercise supplemental jurisdiction over the remaining claims, resulting in a proliferation of additional lawsuits by the same plaintiffs in this Court and the Superior Court of the Commonwealth of Massachusetts. I find that it is appropriate to exercise supplemental jurisdiction pursuant to 28 U.S.C. §1441(c) over the remaining claims in this case, as a matter of discretion, in the interest of judicial economy, convenience, fairness and comity. *Ching v. Mitre Corp.*, 921 F.2d 11, 14 (1st Cir. 1990); *Conway v. Boston Edison Co.*, 745 F. Supp. 773, 778 (D. Mass. 1990); *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 351 (1988).[1] *See also*, *Wentzka v. Gellman*, 759 F. Supp. 484 (E.D. Wis. 1991); *Bank of Oklahoma, N.A., Grove Branch v. Island Marina Ltd.*, 918 F.2d 1476 (10th Cir. 1990); *Com. of Mass. v. V & M Management, Inc.*, 929 F.2d 830, 835 (1st Cir. 1991). The state law claims of the following plaintiffs are all barred by the applicable three-year statutes of limitation in Massachusetts and New Hampshire: Cheryl Adams, Michael Adams, Carrie Burke, Gary Castiglioni, William Connors, Matthew Demas, Michael Grove, Lisa Hawkins, Louis Homesy, Walter Koza, Christopher Morris, William Nault, Melissa Smith Rapa, Thomas Richard, Ronald Ring, David Snyder, Lenora

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1. The principles enunciated by the Supreme Court in *Carnegie-Mellon* are applicable both in cases with state law claims pendent to federal law claims and cases with state law claims separate and independent of federal law claims. *Com. of Mass. v. V & M Management, Inc.*, 929 F.2d 830, 835 (1st Cir. 1991).

Spain, Elizabeth Targee, David Taylor, Matthew Van Winkle and Richard Waugh. Accordingly, to the extent that any of these claims are not barred by the class settlement in *Curley*, they are dismissed as time barred.

4. There remain the claims of Plaintiffs Nancy French and Kathleen Martins. However, on May 26, 1994, the Superior Court for Suffolk County, Commonwealth of Massachusetts, granted summary judgment to the defendants in *Waugh, et al. v. Haseotes, et al.*, No. 93-2663, dismissing all claims of Nancy French against the defendants in that case, almost all of whom are defendants in this case as well. French has taken an appeal from that summary judgment to the Massachusetts Appeals Court. Since the claims asserted by French in this case arise out of the same nucleus of operative facts asserted in the *Waugh* case, I am dismissing her claims, without prejudice to her appeal in *Waugh*. It would not be efficient to retain jurisdiction over the state law claims of one plaintiff. Accordingly, the state law claims of Plaintiff Kathleen Martins are dismissed without prejudice.

5. Plaintiffs have moved to amend the already amended complaint to join 18 additional plaintiffs. The Court need not allow an amendment which would be futile. *Correa-Martinez v. Arrillaga* Belendez, 903 F.2d 49, at 59 (1st Cir. 1990). Proposed plaintiffs William Belcher, Rochelle Belton, John Burbine, Carol Dyer, Michael Farris Galante, Linda Smith Harris, Joseph Ippolito, Richard Kureczka, Anthony Maxham, Carol Murphy, Esther Roche, Federick Sena, Jr. and Shirley Toledo are all members of the settlement class in *Curley*. Accordingly, their claims are barred by reason of the September 8, 1993, Final Order and Judgment in that case. In addition, the claims of these same plaintiffs are barred by applicable statutes of limitation.

Appendix C

There remain proposed plaintiffs Laticia Salvatore, Sherryl Gordon Forget, Richard Keller, Jr., Mark Morin and Brenda Sanborn. The RICO and ERISA claims of these plaintiffs are deficient for the reasons stated by this Court in the *Adams* and *Ring* cases cited above. Salvatore is already a plaintiff in a related case pending in Norfolk Superior Court, *Judson, et al. v. Cumberland Farms, Inc., et al.*, No. 94-12536. It would not be an efficient use of this Court's resources to retain jurisdiction over the state law claims of the other proposed plaintiffs. Accordingly, the motion to amend is denied.

Judgment of dismissal shall issue.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED MAY 2, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 93-11725-JLT

LENORA SPAIN, ET AL

V.

DEMETRIOS HASEOTES, ET AL

ORDER

TAURO, CH.J.:

Pursuant to the Memorandum and Order entered on April 25,1995, judgment is entered for defendants and this action is DISMISSED as to all defendants WITH PREJUDICE.

SO ORDERED.

By the court,

s/ Mary L. Coughlin
DEPUTY CLERK

Dated: May 2, 1995

APPENDIX E — ORDER ENTERING INJUNCTIVE RELIEF AND HOLDING PARTY IN CIVIL CONTEMPT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MAY 4, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. Action No. 86-5057 (SSB)

LANCE CURLEY, et al.,

Plaintiffs,

vs.

CUMBERLAND FARMS, INC., et al.,

Defendants.

ORDER ENTERING INJUNCTIVE RELIEF AND HOLDING PARTY IN CIVIL CONTEMPT

This matter having been brought before this Court upon the application of defendants (except Alger) and Wilentz, Goldman & Spitzer, P.C., Nicholas W. McClear, and Robert W. Smith, by and through their attorneys and appearing *Pro Se*, pursuant to an Order to Show Cause: (1) why Cheryl Adams, Richard Waugh, Brent Adams, Ronald Ring, Patricia Adams, Robert Ravitz, Carrie Burke, Elizabeth Targee, Weldon Adams, Tina Levesque, and Melissa Smith Rappa (hereinafter collectively referred to as "Cohen's Clients"), and their counsel, Stanley R. Cohen, Esq., should not be enjoined from prosecuting two suits captioned as: *Cheryl Adams v. Kevin Burke, et al.*, Suffolk Superior Court, Commonwealth of Massachusetts, Docket No. 94-0627-B, and *Cheryl Adams, et al. v. Kevin Burke,*

et al., United States District Court for the District of Massachusetts, Docket No. 94-10229(MLW) (hereinafter collectively referred to as the "Two New Suits"); (2) why the courts in which the Two New Suits are pending should not be enjoined; and (3) why plaintiffs' counsel, Stanley R. Cohen, Esq., should not be held in civil contempt of this Court's Final Order and Judgment, entered September 8, 1993; and

The Court having considered the submissions of the parties and having heard arguments presented thereon; and

For the reasons provided in the Court's Opinion of this date;

IT IS on this 2nd day of May, 1994, hereby **ORDERED** as follows:

(1) Cohen's Clients and their counsel, Stanley R. Cohen, Esq., are hereby enjoined from prosecuting the Two New Suits;

(2) Cohen's Clients and Stanley R. Cohen, Esq. are hereby ordered to immediately cease and desist from taking any further actions to prosecute claims of Cohen's Clients against Cumberland Farms, Inc., its affiliates and/or its predecessors (including their affiliates and subsidiaries) (collectively "Cumberland"), or any of its past or present owners, directors, officers, employees, agents, attorneys, insurers or named insureds (the "Released Parties"), arising out of or in any way related to Cohen's Clients' employment, including termination of their employment, with Cumberland, in *Cheryl Adams v. Cumberland Farms, Inc.*, Essex Superior Court, Docket No. 91-231 (now consolidated with *Waugh, infra*, in Suffolk Superior Court); *Richard Waugh v. Haseotes, et al.*, Suffolk Superior Court Docket No. 93-2663; *Leonora Spain v. Haseotes, et al.*, U.S.D.C.

Docket No. 93-11725 WP; *Cheryl Adams v. Burke, et al.*, Suffolk Superior Court Docket No. 94-0627-B; and *Cheryl Adams, et al. v. Burke, et al.*, U.S.D.C. Docket No. 94-10229 WF.

(3) The United States District Court for the District of Massachusetts is hereby enjoined from continuing to allow the prosecution of the action captioned *Cheryl Adams, et al. v. Kevin Burke, et al.*, United States District Court for the District of Massachusetts, Docket No. 94-10229(MLW);

(4) The Suffolk Superior Court for the Commonwealth of Massachusetts is hereby enjoined from continuing to allow the prosecution of the action captioned *Cheryl Adams, et al. v. Kevin Burke, et al.*, Suffolk Superior Court, Commonwealth of Massachusetts, Docket No. 94-0627-B; and

(5) Stanley R. Cohen, Esq. is hereby held in civil contempt of this Court's Final Order and Judgment, entered September 8, 1993, and he is hereby ordered to pay to defendants (except Alger), and Wilentz, Goldman & Spitzer, P.C., Nicholas W. McClear, and Robert W. Smith, the attorneys' fees and costs associated with the defense of the Two New Suits and this application, in an amount to be determined by this Court after consideration of affidavit(s) of services rendered and costs incurred, to be submitted within 10 days of the date of the entry of this Order.

(6) Cohen's Clients and Stanley R. Cohen, Esq., are hereby ordered to comply with the terms of this Court's Final Order and Judgment (hereinafter "Judgment"), entered September 8, 1993 (a copy of which is annexed hereto as Exhibit "A"), including ¶ 6 which enjoins them from instituting or prosecuting, either directly or indirectly, any actions against Cumberland

Appendix E

Farms, Inc. and/or any of the Released Parties (as defined in the Judgment at ¶ 5).

s/ Stanley R. Brotman
HON. STANLEY R. BROTMAN
UNITED STATES DISTRICT COURT